

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

In re:

MARTIN HOWSER,

Appellant,

v.

UNITED STATES TRUSTEE,

Appellee.

No. CV-09-0228-FVS

ORDER GRANTING UNITED STATES
TRUSTEE'S MOTION TO DISMISS

THIS MATTER comes before the Court on appeal from the United States Bankruptcy Court for the Eastern District of Washington. Martin Howser appeals an order from the Bankruptcy Court denying employment of counsel in his ch. 11 bankruptcy proceeding. (Ct. Rec. 7 at 2). Currently before the Court is the U.S. Trustee's motion to dismiss this appeal for lack of jurisdiction. Mr. Howser is represented by John Bury and Timothy Fischer. The U.S. Trustee is represented by Gary W. Dyer.

BACKGROUND

On April 29, 2009, Mr. Howser filed a voluntary ch. 11 bankruptcy petition in Bankruptcy Court for the Eastern District of Washington. (Ct. Rec. 9). On May 5, 2009, he filed an application for approval of Timothy Fischer as his attorney. (Ct. Rec. 9). The Bankruptcy Court initially granted the application on June 3, 2009. (Ct. Rec. 9). On June 9, 2009, the U.S. Trustee ("Trustee") moved for reconsideration

1 of the employment because Fischer's firm failed to disclose its
2 representation of Mr. Howser's wife in a state court case. (Ct. Rec.
3 9). On July 20, 2009, the Bankruptcy Court entered an order granting
4 the Trustee's motion to reconsider and denying the employment of Mr.
5 Fischer due to the conflict of interest. (Ct. Rec. 7).

6 On July 27, 2009, Mr. Howser filed a notice of appeal in this
7 Court, seeking reversal of the bankruptcy judge's order granting the
8 Trustee's motion to reconsider and denying the employment of Mr.
9 Fischer as counsel. (Ct. Rec. 1). On July 29, Mr. Howser moved in
10 Bankruptcy Court to convert his ch. 11 reorganization to ch. 7
11 liquidation. (Ct. Rec. 7). Mr. Howser's motion to convert was granted
12 the same day. (Ct. Rec. 7). Mr. Howser then filed a motion to
13 voluntarily dismiss his ch. 7 proceeding on November 3, 2009, which was
14 granted by the Bankruptcy Court. (Ct. Rec. 9). Currently, Mr. Howser
15 is not involved in any active bankruptcy proceeding.

16 On October 13, 2009, the Trustee filed this notice of motion and
17 motion to dismiss Mr. Howser's appeal. (Ct. Rec. 6). The Trustee's
18 argument for dismissal is two-fold. First, since the ch. 11 case was
19 voluntarily converted to ch. 7, any appeal from an order entered in the
20 ch. 11 proceeding is moot. (Ct. Rec. 6). Second, the Trustee argues
21 that an order denying employment is interlocutory, and that this Court
22 lacks jurisdiction under 28 U.S.C. § 158(a)(1) to review an order that
23 is not "final and appealable." (Ct. Rec. 6). Mr. Howser's opposition
24 is grounded in an alleged consolidation of this appeal with an appeal
25 from an order denying his attorney compensation, arguing that this
26 "cures" the jurisdictional defect. (Ct. Rec. 9 at 4).

1 **DISCUSSION**

2 **A. The Mootness Doctrine**

3 The jurisdiction of federal courts is limited to actual
4 "cases and controversies." U.S. Const. art. III, § 2, cl. 2.
5 Generally, an "actual controversy" must exist at every stage of
6 appellate or certiorari review. *Pub. Utils. Comm'n of California v.*
7 *Fed. Energy Reg. Comm'n*, 100 F.3d 1451, 1458 (9th Cir. 1996) (internal
8 quotation marks omitted). Due to this limitation, federal courts have
9 no authority to decide a "moot" case. *Iron Arrow Honor Society v.*
10 *Heckler*, 464 U.S. 67, 70 (1983). "[A] case becomes moot when the
11 issues presented are no longer live or the parties lack a legally
12 cognizable interest in the outcome." *Pub. Utils. Comm'n*, 100 F.3d at
13 1458. If the court is unable to grant adequate relief, it lacks
14 jurisdiction, and the case must be dismissed. *Id.* There are, however,
15 four exceptions that will allow a federal court to assert jurisdiction
16 over a moot case. *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005).
17 These exceptions are: (1) collateral legal consequences, (2) wrongs
18 capable of petition yet evading review, (3) voluntary cessation by the
19 defendant, and (4) class actions where the named party ceases to
20 represent the class. *Id.* Mr. Howser does not allege that any of these
21 exceptions apply, nor does this Court find them applicable in this
22 case.¹ The Bankruptcy Code, which provides the statutory scheme

23
24 ¹This case does not involve a class action, nor does it
25 involve voluntary cessation of allegedly illegal conduct. *In re*
26 *Burrell*, 415 F.3d at 998. Also, the exception for "collateral
legal consequences" is inapplicable. Mr. Howser is not suffering
any legal consequences caused by the bankruptcy court's order
since he has dismissed his bankruptcy petition in its entirety.

1 governing this appeal, is the proper starting point for determining
2 whether this appeal is moot.

3 1. The Bankruptcy Code and employment of counsel

4 Under ch. 11 of the Bankruptcy Code, a debtor-in-possession
5 ("DIP") retains control of the bankruptcy estate, and must manage it
6 for the benefit of the estate and the estate's creditors. See *In re*
7 *Smartworld Technologies, LLC*, 423 F.3d 166, 175 (2nd Cir. 2005). A DIP
8 occupies the same role as a bankruptcy trustee, and is entitled to all
9 the rights, powers, and duties of a trustee. 11 U.S.C. § 1107(a)
10 (2006). As trustee, a DIP may, with court approval, hire an attorney
11 to assist in carrying out the statutory duties of a trustee. *Id.* §
12 327(a). However, the attorney must not hold interests adverse to the
13 estate, and must be "disinterested." *Id.* While § 327(a) does not
14 expressly mention a DIP, it is applicable because of § 1107, which
15 places the DIP in the role of trustee. If the bankruptcy court finds
16 that the attorney fails to meet the requirements of § 327(a), it must
17 deny the application for employment. 11 U.S.C. § 327(a).

18 Conversely, under a ch. 7 petition for liquidation, the debtor
19 does not retain possession or control of the estate, and does not
20 assume the role of trustee. 11 U.S.C. §§ 541, 704. The ch. 7 debtor
21 can also retain counsel, but is not subject to approval by the court,
22 nor is the bankruptcy estate required to pay the ch. 7 debtor's
23 attorney's fees. 11 U.S.C. § 327(a) (limited by its terms to counsel
24 employed by a "trustee"); *Lamie v. U.S. Trustee*, 540 U.S. 526, 538-39

25 See *Pub. Utils. Comm'n*, 100 F.3d at 1460. And finally, this case
26 does not involve a short lived injury that is "capable of
repetition, yet evade[s] review." *Id.*

1 (2004) (holding that in order for an attorney to receive compensation
2 from estate funds, the attorney must be employed pursuant to § 327(a)).

3 2. Conversion from ch. 11 to ch. 7

4 The Bankruptcy Code allows a ch. 11 debtor to voluntarily convert
5 his or her case to ch. 7. 11 U.S.C. § 1112(a) (2006). Lower federal
6 courts have held that once conversion occurs, the original proceeding
7 is terminated, as are all pending appeals from the original case. *See,*
8 *e.g., In re Sasso*, 409 B.R. 251, 255 (1st Cir. B.A.P. 2009); *In re J.B.*
9 *Lovell Corp.*, 876 F.2d 96, 99 (11th Cir. 1989) (holding that a voluntary
10 conversion from ch. 7 to ch. 11 "obviates the need for further
11 litigation of issues unique to Chapter 7."); *In re Roller*, 999 F.2d
12 346, 347 (8th Cir. 1993). The Ninth Circuit also follows this approach,
13 holding that an appeal from a terminated ch. 11 case must be dismissed
14 as moot when the debtor converts to ch. 7 and closes the estate prior
15 to appellate court review. *In re Cook*, 730 F.2d 1324, 1326 (9th Cir.
16 1984). The Ninth Circuit's holding in *Cook* guides the resolution of
17 this case.

18 Presently, Mr. Howser appeals an order entered by the Bankruptcy
19 Court in a now-defunct ch. 11 proceeding. (Ct. Rec. 7). Also, he has
20 since dismissed his ch. 7 case in its entirety. (Ct. Rec. 9 at 3).
21 This conversion and subsequent dismissal rendered any appeal from the
22 ch. 11 case moot. *See In re Cook*, 730 F.2d at 1326. Also, this Court
23 is without jurisdiction because it cannot grant Mr. Howser adequate
24 relief. *Pub. Utils. Comm'n of California v. Fed. Energy Reg. Comm'n*,
25 100 F.3d 1451, 1458 (9th Cir. 1996). In the case at bar, the order that
26 is being appealed was entered in the ch. 11 case, which requires the

1 Bankruptcy Court to approve the employment of an attorney hired to
2 assist the trustee (or DIP). 11 U.S.C. § 327(a). However, under ch.
3 7, the debtor is not required to seek court approval of counsel, nor is
4 the estate responsible for paying the attorney's fees. 11 U.S.C. §
5 327(a) (limited by its terms to a "trustees" employment of counsel).
6 When Mr. Howser voluntarily converted his case to ch. 7, it removed
7 this Court's ability to grant him effective relief in his ch. 11 case
8 because he no longer needs court approval before hiring an attorney.
9 See *In re Cook*, 730 F.2d at 1326. The record also indicates that there
10 is no current bankruptcy proceeding: Mr. Howser has voluntarily
11 dismissed his ch. 7 petition. (Ct. Rec. 9). Once the estate is
12 closed, whether by discharge under another chapter or voluntarily, the
13 possibility of granting adequate relief is foreclosed. See *In re Cook*,
14 730 F.2d at 1326. Consequently, under Ninth Circuit case law, this
15 Court has no jurisdiction over this moot appeal.

16 **B. Interlocutory Appeals**

17 Even if the Court concluded that this appeal was not moot, it
18 would still dismiss this appeal as interlocutory. The Trustee's
19 argument that an order denying employment of counsel is interlocutory,
20 therefore depriving this Court of jurisdiction, is persuasive and well-
21 founded. The Trustee relies on 28 U.S.C. § 158(a)(1), which states
22 that the district courts "shall" have jurisdiction to hear appeals that
23 are "from final judgments, orders and decrees." (Ct. Rec. 6). The
24 Trustee further argues that the provisions of § 158(a)(3), which allows
25 discretionary review of interlocutory orders, is inapplicable in this
26 case because Mr. Howser did not seek the required leave of the Court.

(Ct. Rec. 6). The Trustee acknowledges that while Federal Rule of Bankruptcy Procedure 8003(c) allows this Court to construe Mr. Howser's notice of appeal as a motion for leave to appeal, it should not exercise discretionary review in this case. (Ct. Rec. 6). The Court agrees.

1. Procedure for Appealing a Bankruptcy Court order

Section 158(a) of title 28 gives district courts appellate jurisdiction over "final judgments, orders, and decrees" entered by a bankruptcy court. 28 U.S.C. § 158(a)(1). If the appellant is appealing an interlocutory order of the bankruptcy court, the appellant must seek leave from the district court prior to filing a motion to appeal an interlocutory order. 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8001(b). If the appellant does not seek the required leave, the district court may, in its discretion, construe the notice of appeal as the motion for leave to appeal. Fed. R. Bankr. P. 8003(c).

In the present case, Mr. Howser timely filed a notice of appeal with this Court on July 24, 2009. (Ct. Rec. 9). However, he did not file a motion for leave to appeal the interlocutory order, as required under § 158(a)(3). Thus, if the order denying employment is interlocutory, the Court is without jurisdiction, unless it views the notice as a motion for leave. This requires a determination of whether the order on appeal is interlocutory.

2. Orders Denying Employment Under 11 U.S.C. § 327(a) are Interlocutory.

Under Ninth Circuit case law, an order denying employment of counsel in a bankruptcy case is interlocutory. See *In re SS Retail Stores Corp.*, 162 F.3d 1230, 1232 (9th Cir. 1998) (citing *In re Westwood*

1 *Shake & Shingle, Inc.*, 971 F.2d 387, 389 (9th Cir. 1992)). These cases
2 addressed the Ninth Circuit's jurisdiction over a district court's
3 affirmance of bankruptcy court orders approving appointment of counsel.
4 In *Westwood Shake*, the Ninth Circuit held that in order for it to have
5 jurisdiction, the district court must have had jurisdiction as well.
6 971 F.2d at 389. The Ninth Circuit recognized that even under the
7 "flexible" standard for bankruptcy appeals, courts have consistently
8 held that an order denying or granting employment is interlocutory.
9 *Id.* Since the bankruptcy court order was interlocutory, the district
10 court order affirming it was as well, and the Ninth Circuit dismissed
11 the appeal. *Id.* at 391. This approach is also followed in other
12 circuits. See *In re Devlieg, Inc.*, 56 F.3d 32, 34 (7th Cir. 1995); see
13 also *In re Continental Investment Corp.*, 637 F.2d 1, 4 (1st Cir. 1980)
14 (finding that order denying motion to disqualify counsel in bankruptcy
15 case was not final). Thus, because the order denying employment is
16 interlocutory, Mr. Howser has no right to appeal. His only possible
17 relief is discretionary review under § 158(a)(3).

18 3. The issue presented in this case does not meet the standard
19 for granting review of interlocutory orders.

20 Because neither the Bankruptcy Rules nor § 158(a)(3) provide a
21 standard for a district court to apply when allowing interlocutory
22 appeals, many district courts use the standard governing interlocutory
23 appeals from district courts to circuit courts. *In re Zech*, 185 B.R.
24 334, 336-37 (D. Neb. 1995). This standard requires a determination of
25 (1) whether the issue involves a controlling issue of law, (2) whether
26 there is substantial ground for difference of opinion on that issue of
law, and (3) whether an immediate appeal will materially advance the

1 ultimate termination of the litigation. *Id.*; 28 U.S.C. § 1292(b)
2 (2006). Granting leave to file interlocutory appeals is the exception,
3 not the rule, and should only be granted in extraordinary
4 circumstances. *In re Zech*, 185 B.R. at 337. "Indeed, because
5 interlocutory appeals interfere with the cumulative goal of the
6 bankruptcy system . . . they are not favored." *Id.* (citing *In re Kroh*
7 *Bros. Dev. Co.*, 101 B.R. 1000, 1007 (W.D. Mo. 1989).

8 In this case, there is no "substantial ground for difference of
9 opinion" because the Bankruptcy Court merely applied the express terms
10 of the statute. 11 U.S.C. § 327(a). The Bankruptcy Court is mandated
11 to deny employment of counsel that is not disinterested. *Id.* There is
12 no room for differing opinions on this issue. Also, extraordinary
13 circumstances do not exist in this case that warrant review of this
14 interlocutory order. Finally, granting review of this appeal will not
15 benefit the expeditious termination of this litigation because it has
16 already been terminated. Mr. Howser's appeal is interlocutory, and
17 discretionary review of the order is inappropriate. Accordingly, even
18 if the Court found that this appeal was not moot, the Court would still
19 dismiss Mr. Howser's appeal for lack of jurisdiction over an
20 interlocutory appeal.

21 C. Consolidation of Appeals Argument

22 Mr. Howser attempts to avoid the dismissal of his appeal by
23 arguing that he has consolidated this appeal ("First Appeal"), with
24 another appeal from an order denying compensation to his lawyers
25 ("Second Appeal"), which is "final and appealable." (Ct. Rec. 9).
26 Mr. Howser argues that this removes any jurisdictional defect in the

1 First Appeal. He states in his response brief that he has filed a
2 Motion to Consolidate Appeals. (Ct. Rec. 9). The Record does not show
3 that this motion has been filed, nor does Mr. Howser's argument
4 persuade the Court.

5 Mr. Howser relies solely on one case from the Eleventh Circuit as
6 support for his contention that consolidating appeals makes the
7 jurisdictional question in the First Appeal moot. (Ct. Rec. 9). That
8 case, *Nicholson v. Shafe*, dealt with simultaneous proceedings in both
9 state and federal court. 558 F.3d 1266, 1268 (11th Cir. 2009). On
10 March 25, 2008, a federal district court ordered the appellants to pay
11 an undetermined amount of attorney's fees. *Id.* at 1270. The next day,
12 the appellants appealed to the Eleventh Circuit. *Id.* The Eleventh
13 Circuit questioned its jurisdiction based on whether the order awarding
14 unspecified fees was "final and appealable." *Id.* On May 14, 2008, the
15 district court quantified the amount of attorney's fees. *Id.* The
16 appellants then filed another notice of appeal as to that final order.
17 *Id.* The appellants also filed a motion to consolidate the two appeals.
18 *Id.* The Eleventh Circuit held that because the appellants appealed the
19 final order of fees, and consolidated it with the appeal of the first
20 order, any jurisdictional question regarding the first appeal was
21 "moot." *Id.* This was because the Eleventh Circuit's question
22 regarding the propriety of reviewing an order of unspecified fees was
23 mooted when the district court quantified the fees. *See id.*

24 The holding in *Nicholson* does not benefit Mr. Howser because in
25 that case, the two appeals addressed the same issue (amount of
26 attorney's fees). Here, they do not. One appeal addresses the

1 Bankruptcy Court's denial of employment, while the other addresses its
2 denial of fees. Also, *Nicholson* does not stand for the proposition
3 that consolidation of appeals can remedy any jurisdictional defect. It
4 merely states that once the fees were quantified, the jurisdictional
5 question regarding the review of an unspecified fee award was moot.
6 *Id.* Also, consolidating appeals does not create Article III
7 jurisdiction when the entire case is moot due to voluntary dismissal.
8 As stated earlier, a federal court only has jurisdiction over "cases
9 and controversies." U.S. Const. art. III, § 2, cl. 2. As Mr. Howser
10 has dismissed his bankruptcy proceeding, there is no case or
11 controversy, and this Court cannot grant Mr. Howser adequate relief.
12 This case is moot, and the consolidation of appeals, whether it occurs
13 or not, will not revive the issues and confer jurisdiction on this
14 Court.

15 **CONCLUSION**

16 The Court, being fully advised, **HEREBY ORDERS** the U.S. Trustee's
17 Motion to Dismiss Appeal (**Ct. Rec. 6**) is **GRANTED**. This action is
18 **dismissed with prejudice**.

19 **IT IS SO ORDERED.** The District Court Executive is hereby directed
20 to enter this order, provide copies to counsel, **enter judgment in favor**
21 **of Appellee** and **CLOSE THE FILE**.

22 **DATED** this 17th day of February, 2010.

23 S/Fred Van Sickle

24 Fred Van Sickle
25 Senior United States District Judge
26